Statement of
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before the

Commerce, Science and Transportation Committee
United States Senate

on

National Tobacco Settlement Legislation

on behalf of

The National Governors' Association

It is an honor to testify before the committee today on the development of national tobacco settlement legislation, one of the most critical issues facing states. Decisions made by this committee in drafting tobacco legislation will have significant implications for the states. I appreciate your interest in the effects of federal reforms on state programs.

During the past several months, this committee and others have conducted several important hearings to consider the ramifications of the proposed tobacco settlement negotiated last June by the state attorneys general, the tobacco industry, and representatives of the public health community. Hearings have addressed many issues including, advertising, liability, public health, and the needs of tobacco growers. You have heard from public health leaders, industry chief executive officers, and members of Congress.

The Governors are grateful for your interest in hearing from the states. After Congress passes a tobacco bill and the President signs it into law, much of the ultimate success of any changes in policy will ultimately depend on state implementation of those changes. The Governors share your commitment to reduce youth smoking. For states to achieve that goal, they need to be involved in designing programs that will work and complement existing state initiatives. States can be your partners in helping ensure that our children grow up tobacco-free.

States are leaders in challenging the tobacco industry. In 1994 states filed the first broad lawsuits against the tobacco industry based on claims relating to consumer protection, fraud, racketeering, antitrust violations, and health care costs. Since then, forty-one states and territories have filed their own lawsuits to, for example, reduce youth smoking, secure public disclosure of tobacco documents, and recoup state health care costs.

These lawsuits represent years of state effort and leadership. Without this leadership the current debate over national settlement legislation would be impossible. The Governors must be full participants in drafting national legislation to ensure that state expertise is utilized and state needs are addressed as complex policy changes are considered.

Reducing Youth Smoking

The Governors are committed to reducing youth smoking and restricting young people's access to tobacco products. Although not every element of a smoking-reduction strategy will fall under the jurisdiction of states, reforms related to marketing, advertising, and corporate culture feed directly into situations that states will encounter in reducing sales to youth smokers and ensuring enforcement. The Governors will prioritize fulfilling state responsibilities under a national settlement, but reductions in youth smoking will not be achieved unless everyone does their part.

Enforcement of Youth Smoking Restrictions. Current law prohibits tobacco sales to minors. Although the Governors strongly support the intent of the Synar Amendment, it has been difficult to achieve the desired outcome of reducing young people's access to tobacco products through the enforcement structure set up by the provision, largely because of a lack of funding for implementation and the overly prescriptive nature of the relevant regulations.

As a starting point in new legislation, the *existing* Synar Amendment should be repealed and replaced with a rational system of enforcement designed jointly by state governments and the federal government to ensure that, operationally, the system will allow states to produce the desired results. The Governors appreciate the enforcement structure set forth in Senator Jeffords' bill, S. 1648, which includes the repeal of the existing Synar requirements and empowers states to design their own enforcement strategy.

A new approach to enforcement should promote performance. Rather than financially penalizing states that face difficult enforcement challenges, an effective enforcement policy would support states in their efforts to achieve their targets and reward results.

It is critical that the settlement legislation make funding available to each state to finance aggressive enforcement. Whenever states are called on to enforce federal standards, federal funding must be made available. Without sufficient federal funding, states cannot be held responsible for implementing federal enforcement requirements. In addition, states must have the flexibility to coordinate federal enforcement requirements with existing state and local enforcement efforts targeted toward youth.

Targets. It is likely that the settlement legislation will include targets for successful enforcement of *no sales to minors* laws. Given the significance of these targets, it will be important to use a mutually agreed upon data set and methodology with which to measure progress. States must be involved in setting targets so that these goals are not arbitrary and could be achieved through aggressive implementation of the reforms included in the overall legislative package.

Unrealistically high targets would create a counterproductive "catch-22" for states. Failure to meet targets would result in reductions in available funding, making it difficult for states to increase their enforcement efforts. Working with states, aggressive but reasonable targets must be set. Targets of 95 percent may not be reasonable for those states now struggling to reach the Synar Amendment's 80 percent thresholds.

Preempting State Responsibilities.

The settlement agreement negotiated between the attorneys general and the tobacco industry includes provisions that preempt traditional state responsibilities, including those related to regulation and enforcement. As national legislation is drafted, preemptions should be undertaken only when it proves impracticable to achieve the desired outcomes by building on existing state authority.

Access. Controlling access to tobacco products is the most fundamental element in a strategy to reduce youth smoking. It is likely that Congress will consider whether to incorporate into the legislation standards similar to those developed by the Food and Drug Administration (FDA) to restrict youth access to tobacco. The FDA standards include a minimum purchase age and photo identification requirements. If national minimum standards were to be adopted, states must be involved in developing them. Moreover, as the state attorneys general recognized, it is critical at a minimum to preserve the authority of the individual states to adopt stricter access measures.

Licensing. Currently, states are responsible for regulating the retailers who sell tobacco products. Forty-six states already require the licensing of parties who sell tobacco products. The Governors would not support federalizing licensing responsibilities. They would view this as an unwarranted preemption of existing state authority.

Instead, under national tobacco settlement legislation, the Governors would support a requirement that every state have state-designed licensing standards for retailers of tobacco products. Those standards must include a system of penalties for retailers found to have violated their obligations.

Retail licensing cannot be effectively administered or enforced at the federal level. It is an inherently local function, and federal requirements would deny states the ability to tailor systems to address their particular situations. For example, national standards for the penalties to be levied against retailers who violate no sales to minor requirements may be too lenient to serve as real disincentives in one part of the nation but too stringent to enable penalty collections in another. State-designed penalties would address these regional differences.

Exposure to Environmental Smoke. The Governors are concerned about the health effects of exposure to environmental tobacco smoke and believe that steps must be taken to protect public health. However, protections should be undertaken at the state and local levels, rather than at the federal level. Currently, states and communities have implemented aggressive strategies and enacted legislation to reduce second-hand smoke in the environment. The development of state and local solutions should be encouraged by national settlement legislation without unnecessary federal intrusions.

Resolving State Lawsuits

Consent Decrees. Accompanying any federal legislation would be a series of consent decrees between the tobacco industry and the individual states that have filed lawsuits. These decrees would formally resolve outstanding state lawsuits against the tobacco industry.

States will determine whether to sign the consent decrees or proceed with their lawsuits. The implications of any national settlement legislation for states will be carefully evaluated before states decide to sign consent decrees resolving their individual lawsuits.

Constitutional Waivers. The consent decrees accompanying settlement legislation would include a waiver of any claims that provisions of the settlement violate state constitutions or the U.S. Constitution. Such a waiver may be necessary to guarantee compliance with provisions of the settlement, but ceding constitutional protections should be done only when absolutely necessary. Moreover, the relevant waiver language must be structured as narrowly as possible. Rather than a broad constitutional waiver, the consent decrees could include a more limited waiver of free speech claims against tobacco industry advertising restrictions.

Sharing Tobacco Settlement Funds

National tobacco settlement legislation will yield significant new revenues to be shared between state governments and the federal government. The Governors strongly believe that there should be a state portion of the total tobacco settlement funds and a federal portion, both of which would finance other prioritized investments.

State Settlement Funds. The nation’s Governors attach the highest priority to clarifying that settlement funds negotiated to settle state lawsuits must go to the states. The federal government is not entitled to take away from the states any of the funds negotiated on the states’ behalf as a result of state lawsuits. Any efforts by the federal government to recoup federal costs must be achieved through separate negotiations and must seek funds not already designated for states.

The Governors have endorsed legislation to clarify explicitly that state tobacco settlement funds are not Medicaid overpayments subject to federal recoupment. S. 1471, introduced by Senator Bob Graham, and H.R. 2938, introduced by Representative Michael Bilirakis, would ensure that funds negotiated by the states to settle state lawsuits must go to the states.

Some in Congress and the administration look to existing Medicaid third-party liability provisions to assert a claim against state tobacco settlement funds. These Medicaid provisions were adopted decades ago to facilitate reimbursements from insurance companies for small claims and provide tools to fight provider fraud. No one envisioned the use of these provisions to take away from the states the payments received as the result of massive, state-initiated negotiations with the tobacco industry.

Whether state payments stem from a single national legislative package, or through state-specific settlements negotiated directly with the industry to resolve individual state lawsuits, the Governors will strongly oppose any federal efforts to seize state tobacco settlement funds. If Congress passes a tobacco bill that does not settle outstanding state lawsuits, one of the Governors' highest priorities will be to support the inclusion of S. 1471/H.R. 2938 in that legislation.

If Congress passes a comprehensive bill that settles the state suits, the Governors believe that because states made possible the debate about a national settlement, state settlement funds must be a protected and recognized core of the final package. This state portion of a national tobacco settlement package should be distributed through an interstate compact or other similar structure.

The Governors strongly believe that annual direct payments to states should not become a part of the federal budget process subject to congressional action. An interstate compact would guarantee the reliability and integrity of the state portion of the national settlement. The compact would serve a purely administrative function.

Federal Settlement Funds. In addition to state settlement funds, the agreement negotiated between the attorneys general and the tobacco industry included a significant financial payment to the federal government. It is likely that any national legislation will include a similar provision. The federal government and state governments must work together to ensure effective coordination of all available resources. New federal investments must be structured with sufficient flexibility to permit the implementation of comprehensive strategies that build on other existing state and local programs targeted to young people.

For example, flexibility is needed to permit the integration of federal anti-tobacco enforcement and education efforts with state enforcement and education programs. Such integration will enable the development of comprehensive strategies to reduce youth alcohol and drug abuse, thus maximizing program effectiveness and minimizing unnecessary bureaucracy and duplication of effort.

The federal government will benefit significantly from a tobacco settlement. The Governors believe that benefit should not include taking a portion of state settlement funds in addition to federal settlement dollars. That is why protection from recoupment is so important to states.

Disputed Funds. The Governors strongly oppose federal recoupment of state tobacco settlement funds. They are concerned that in addition to the two categories described above, the administration's budget and some members of Congress envision a third category of tobacco settlement funds— one federally controlled but administered by states, or other federal expenditures of state settlement funds.

The Governors strongly believe that settlement funds fall into two basic categories: direct payments to states and federal settlement funds. However, last October, the U.S. Department of Health and Human Services made clear that it would seek to recoup what it perceives to be a federal claim for the state portion of tobacco settlement funds. This federal claim may be the foundation of this third category of disputed funds. Under this scenario, recouped dollars could then be given back to states with instructions on the use of these funds. The Governors strongly oppose federal recoupment of state tobacco settlement funds.

It must be recognized that the most fundamental of any Governor's responsibilities is promoting the collective well-being of the citizens of his or her state. Commitment to this responsibility motivated forty-one states and territories to initiate the lawsuits against the tobacco industry that have made the debate about national settlement legislation possible. This fundamental responsibility should be reflected in the content of any bill ultimately signed into law.

Therefore, while the Governors make clear that these are not federal funds – they are state funds – they are willing to work with Congress and the administration to ensure that these funds are used, directed, and administered by the states for programs to promote the health, education, and welfare of our citizens, as well as assistance for at-risk youth, and the well-being of all children.

Miscellaneous Issues

Public Health Investments. Any new federal public health initiatives financed through national tobacco settlement legislation must be developed in consultation with states to ensure the effective coordination of these initiatives with existing state programs.

Growers' Issues. Proposed national legislation on the regulation of tobacco products will have a significant effect on tobacco growers and quota holders, their communities, and states with economies that are closely tied to agriculture. Accordingly, the Governors urge Congress and the administration to address the needs of these communities and the need for a strong, fair, grower-owned tobacco program.

Implementation. The adoption of national tobacco settlement legislation may result in significant changes in state responsibilities. States must be given sufficient time to ensure successful implementation of these changes.